Filed 2/15/11 Westfield, LLC v. Millard Mall Services CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WESTFIELD, LLC et al., Cross-complainants and Appellants, v. MILLARD MALL SERVICES, INC., Cross-defendant and Respondent.	D056665 (Super. Ct. No. 37-2008-00083984-CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

A shopping mall patron was injured when she slipped and fell at a shopping mall owned by Westfield, LLC and Parkway Plaza, LP (together Westfield). The patron filed a personal injury lawsuit against Westfield and others, including Millard Mall Services, Inc. (Millard), the company hired by Westfield to provide cleaning services at the mall, and Professional Security Consultants, Inc. (PSC), the company hired by Westfield to provide security services at the mall. The jury returned a verdict in favor of the patron,

finding that Westfield, Millard and PSC were negligent. The jury assessed comparative fault at 50 percent to Westfield, 40 percent to Millard, and 10 percent to PSC.

In a postverdict proceeding, Westfield moved for judgment on its cross-complaint against Millard that alleged, under an indemnity clause in its contract with Millard, Westfield was entitled to indemnity from Millard for Westfield's liability to the patron. The court ruled against Westfield, and this appeal followed.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Parties

Westfield owns the Westfield Mall. Westfield entered into a written contract with Millard (the contract) in which Millard agreed to provide housekeeping services at the Westfield Mall. Millard's housekeeping services included walkway patrol and spill removal services to maintain the walkways in a safe condition.

B. The Lawsuit and Judgment

On April 21, 2007, Ms. Radogna was shopping at the Westfield Mall. She slipped and fell because of the presence of a slippery substance on a walkway. She sued numerous parties alleging they had been negligent in the ownership, maintenance, cleaning, control, operation and inspection of the walkway; the premises were dangerous,

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1 Our description of the facts surrounding the underlying slip and fall does not resemble the "facts" as portrayed by Westfield's opening brief because Westfield's "factual" description relies almost exclusively on the contentions contained in the trial briefs filed by Westfield and PSC rather than the evidence adduced at trial. We are constrained to view the facts most favorably to the judgment. Because it has made no effort to portray the facts most favorably to the judgment, Westfield has waived any assertion that the trial court's determination is unsupported by the evidence. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.)

defective and unsafe; and that as a result she slipped and fell. Westfield's cross-complaint against Millard alleged, among other claims, a cause of action for contractual indemnity. The jury found Westfield, Millard and PSC had been negligent, and assessed comparative fault of 50 percent to Westfield, 40 percent to Millard, and 10 percent to PSC.

C. The Posttrial Motion

After the jury's verdict was recorded, the court scheduled and heard Westfield's request for a judgment on its cross-complaint against Millard under the express indemnity provision of the contract. That provision states:

> "[Millard] agrees to indemnify, defend, protect and hold [Westfield] . . . harmless, from and against any and all claims, losses, proceedings, damages, causes of action, liability, injury, awards, fines, judgments, costs and expenses (including but not limited to reasonable attorneys' fees) arising from, related to or in connection with, or caused by: 1) the SERVICES to be provided hereunder, or 2) the failure to provide the SERVICES, including any of the same regardless of whether same shall occur after the completion of the SERVICES, or 3) any condition or loss for which [Westfield] and [Millard] may be jointly or severally liable or 4) any claim made against [Westfield] in connection with the activities or failure to act of any employee or contractor or subcontractor of [Millard], irrespective of whether such employee is a loaned employee to or a borrowed servant of an Additional Insured. The foregoing indemnity shall apply regardless of whether any claims, losses, proceedings, damages, causes of action, liability, injury, awards, fines, judgments, costs and expenses are caused in part by [Westfield]. . . ."

Westfield argued Millard was contractually obligated to indemnify it for the portion of the judgment attributed to Westfield's negligence because (1) the indemnity clause explicitly and clearly required indemnification even for Westfield's own active

negligence; and (2) even if this provision were construed as a general indemnity clause, the circumstances showed the parties contemplated that Millard would be required to indemnify Westfield for that portion of the loss attributable to Westfield's own active negligence. Millard opposed Westfield's claim, asserting the indemnity clause did not explicitly and clearly require Millard to indemnify Westfield for Westfield's own active negligence but was instead a general indemnity clause; and under which clause, Millard would not be required to indemnify Westfield for losses attributable to Westfield's active negligence. Millard argued the facts supported the conclusion that the jury assessed fault to Westfield based on Westfield's active negligence,[2] and therefore there was no right to indemnity under the contract.

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[2] Westfield argued the evidence showed it was only passively negligent. Westfield asserted the evidence showed that the night before the accident Millard learned an employee of a Mrs. Field's shop had put out a trash bag that leaked a slippery substance onto the walkway. Westfield also asserted the evidence showed Millard attempted, but failed, to adequately clean the substance, and instead left the walkway in a slippery condition; and this was the cause of the plaintiff's fall. Millard, opposing Westfield's indemnification motion, contested this version of the facts. Millard asserted the evidence showed it had in fact adequately cleaned the spill using a degreaser. Millard also argued that, long after its cleaning crew determined the area was safe and had left the area, PSC personnel received complaints an area was slippery and a PSC employee, after personally determining the area was slippery, blocked off the area using caution tape and benches. The PSC employee reported the slippery condition to Westfield's manager, who directed PSC to take down the barricades and open the wing despite the slippery condition, and neither PSC nor Westfield contacted Millard to report the slippery condition. Almost immediately after Westfield's manager directed PSC to reopen the area, the plaintiff was injured. There apparently was some evidence the slippery condition that caused the accident was *unrelated* to the trash bag leak, because the area where the patron slipped was at least *50 feet* from the location of the trash bag. The jury may well have concluded the trash bag leak was unconnected to the later slip and fall because the jury's special verdict attributed *no* fault to Mrs. Field's.

The trial court ruled the contractual indemnity clause was a general indemnity clause and did not explicitly and clearly state that Millard would be required to indemnify Westfield for losses attributable to Westfield's own negligence. Accordingly, the court ruled Millard would not be required to indemnify Westfield for that portion of the loss attributable to Westfield's active negligence.

II

ANALYSIS

A. Legal Principles

"Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*); *Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864 (*Maryland*).) "An indemnitor is the party who is obligated to pay another. An indemnitee is the party who is entitled to receive the payment from the indemnitor." (*Maryland,* at p. 864.)

"An indemnity obligation arises from two general sources. First, it may arise from 'express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' " (*Maryland, supra,* 35 Cal.App.4th at p. 864; Civ. Code, § 2772.) "Indemnity may also arise based on equitable considerations." (*Maryland,* at p. 864; *Rossmoor, supra,* 13 Cal.3d at p. 628.) Where the parties have expressly contracted with respect to the duty to indemnify, "the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity." (*Markley v. Beagle* (1967) 66 Cal.2d 951, 961.)

An agreement for indemnification "must be clear and explicit" and is "strictly construed against the indemnitee." (*Goldman v. Ecco-Phoenix Elec. Corp.* (1964) 62 Cal.2d 40, 44 (*Goldman*); see also *Vinnell Co. v. Pacific Elec. Ry. Co.* (1959) 52 Cal.2d 411, 416 (*Vinnell*).) When a contract purports to require the indemnitor to indemnify the party who prepared it from liability for that party's own negligence or tortious conduct, the language "must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." (*Ferrell* v. *Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal.App.3d 309, 318.) "[C]ontractual clauses seeking to limit liability will be strictly construed and any ambiguities resolved against the party seeking to limit its liability for negligence" (*Philippine Airlines, Inc.* v. *McDonnell Douglas Corp.* (1987) 189 Cal.App.3d 234, 237), and an indemnification agreement providing financial protection against one's own negligence cannot rest on loose and obscure language. (*Goldman*, at p. 48.)

However, contractual indemnity language "need not achieve perfection" to be effective. (*National & Internat. Brotherhood of Street Racers, Inc.* v. *Superior Court* (1989) 215 Cal.App.3d 934, 938.) "Courts interpret contractual indemnity provisions under the same rules governing other contracts, with a view to determining the actual intent of the parties." (*Maryland*, 35 Cal.App.4th at p. 864.) In *Hohe* v. *San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1567-1568, this court confirmed that "[t]he presence or absence of the word[] 'negligence' . . . is not dispositive. We look instead to the intention of the parties as it appears in the release forms before the court."

In *MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413, the court provided an analytic framework for interpreting indemnity agreements, and set forth three general categories of indemnity agreements. The court stated:

> "The first type of provision is that which provides 'expressly and unequivocally' that the indemnitor is to indemnify the indemnitee for, among other things, the negligence of the indemnitee. Under this type of provision, the indemnitee is indemnified whether his liability has arisen as the result of his negligence alone ([*Vinnell, supra,* 52 Cal.2d 411]) or whether his liability has arisen as the result of his co-negligence with the indemnitor [citing *Markley v. Beagle, supra,* 66 Cal.2d 951]."
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> "The second type of provision is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee's liability 'howsoever same may be caused' ([*Vinnell, supra,* 52 Cal.2d 411]) or 'regardless of responsibility for negligence' ([*Goldman, supra,* 62 Cal.2d 40]), or 'arising from the use of the premises, facilities or services of [the indemnitee]' [*Harvey Mach. Co. v. Hatzel & Buehler, Inc.* (1960) 54 Cal.3d 445 (*Harvey*)], or 'which might arise in connection with the agreed work' [citation] . . . . Under this type of indemnity provision, the indemnitee is indemnified from his own acts of passive negligence that solely or contributorily cause his liability, but *is not indemnified for his own acts of active negligence* that solely or contributorily cause his liability. Our Supreme Court explains that an actively negligent indemnitee will not be indemnified under this type of provision because '[t]he indemnification agreement resembles an insurance agreement' [citing *Goldman,* at p. 48] and an 'indemnitor [will not] be made responsible for the [actively] negligent acts of an indemnitee over whose conduct it has no control [unless] the language imposing such liability should do so expressly and unequivocally so that the [indemnitor] is advised in definite terms of the liability to which it is exposed' [citing *Vinnell,* at pp. 416-417.] A passively negligent indemnitee will be indemnified under this type of provision, however, because such provisions 'manifest that it is the intent of the parties' that the indemnitee's passive negligence 'was one of the risks, if not the most obvious risk, against which [the indemnitee] sought to be covered.' [Quoting *Harvey,* at p. 448.] Most of our Supreme Court's work in the law of contractual indemnity has been with this type of provision and with the

> indemnitee who has himself been either solely or contributorily responsible for his liabilities. *In these cases, the determinative issue is whether the indemnitee's negligence was active or passive*."
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> "The third type of contractual provision is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities that were caused by other than the indemnitor. Under this type of provision, any negligence on the part of the indemnitee, either active or passive, will bar indemnification against the indemnitor irrespective of whether the indemnitor may also have been a cause of the indemnitee's liability." (*MacDonald & Kruse, Inc. v. San Jose Steel, supra*, 29 Cal.App.3d at pp. 419-420, italics added, fn. omitted.)

In *Vinnell, supra,* 52 Cal.2d 411, the court explained that use of the term "negligence" is significant when construing a contractual clause, stating:

> "The rule in this state . . . is in accord with the weight of authority. 'In the overwhelming majority of the cases the result reached by their interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.' " (*Id*. at p. 415.)

B. Application

Paragraph 15 of the contract contains the terms of the indemnity agreement. The first sentence of paragraph 15.1 imposes on Millard the obligation to indemnify Westfield for any judgments arising from (1) the services provided by Millard under the contract, or (2) the failure to provide those services, (3) a condition or loss for which Westfield and Millard may be jointly and severally liable, and (4) any claim made against Westfield in connection with the activities or failure to act of any employee of Millard. This language focuses almost exclusively on indemnification for losses caused by the acts or omissions

of Millard's employees in performing its contractual obligations. There is nothing in this first sentence of the indemnification agreement that suggests Millard undertook to be responsible for the *actively* negligent acts of Westfield (over whose conduct Millard had no control), and does not contain language that so expressly and unequivocally imposes such an obligation that we can conclude Millard was advised in definite terms that it was exposed to liability for the negligence by Westfield's personnel. Under numerous cases, including *Goldman* and *Rossmoor*, the language that principally describes the scope of the indemnity is insufficiently clear and explicit to encompass indemnification for Westfield's own active negligence.[3]

Westfield's argument relies almost exclusively on the *second* sentence of paragraph 15.1 as evidence that the parties intended Millard would provide Westfield with "financial protection against [Westfield's] own negligence" (*Goldman, supra*, 62 Cal.2d at p. 48). However, that second sentence, which provides the "foregoing indemnity shall apply *regardless of whether any* [*claim is*] *caused in part by* [*Westfield*]" (italics added), is substantively indistinguishable from the indemnity clause in *Goldman*, which provided the indemnity would apply to any claim "directly or indirectly arising from the performance of the contract or work, *regardless of responsibility for negligence;* and . . . *howsoever the same may be caused.*" (*Id.* at pp. 42-43, fn. 2, italics added.)

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3 On appeal, Westfield asserts that, under the factual circumstances of this case, it cannot be found to have been actively negligent in connection with the accident. However, that claim was not raised below and we do not further consider it on appeal. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.)

Goldman concluded this language was not sufficiently specific to include indemnity for losses caused by the indemnitee's active negligence.

The clause relied on by Westfield merely states that the "foregoing indemnity"—the indemnity provided by the *first* sentence—would "apply regardless of whether [such judgment is] caused in part by [Westfield]." We are convinced the quoted language was intended to insure only that the "foregoing" obligation (Millard's obligation to indemnify Westfield for losses attributable to Millard's negligence) was to be *preserved* even if Westfield's negligence contributed to the injury, and was not intended (as Westfield argues) to *expand* the "foregoing" obligation by requiring Millard to shoulder *sole* liability for a loss partly attributable to Westfield's active negligence.

We are guided by the applicable principles that "(a) the agreement for indemnification must be strictly construed against the indemnitee, and (b) . . . to include acts amounting to active or affirmative negligence, the indemnity provision must be clear, positive and specific to that effect." (*Burlingame Motor Co. v. Peninsula Activities, Inc.* (1971) 15 Cal.App.3d 656, 663.) Because the language on which Westfield relies lacks the requisite clarity and specificity, and its ambiguities must be construed against Westfield, we conclude the language must be construed as a general indemnity clause under which Westfield may not obtain indemnity for its acts amounting to active or affirmative negligence.

Westfield argues that, even assuming the contractual statement providing for indemnity "regardless of whether any [claim is] caused in part by [Westfield]" is not construed as explicitly referring to Westfield's active negligence, the absence of the term

"negligence" is not dispositive. (*Hohe* v. *San Diego Unified Sch. Dist., supra,* 224 Cal.App.3d at 1567-1568.) Westfield argues that cases such as *Harvey, supra,* 54 Cal.2d 445 and *Schackman v. Universal Pictures Co.* (1967) 255 Cal.App.2d 857 have shown that an actively negligent indemnitee may obtain indemnification under a nonspecific indemnity clause when other circumstances show the parties intended to provide for indemnification. Certainly, the courts have recognized that "it is the intent of the parties which the court seeks to ascertain and make effective. Where . . . the circumstances of the claimed wrongful conduct dictate that damages resulting therefrom were intended to be dealt with in the agreement, there is no room for construction of the agreement. It speaks for itself." (*Harvey,* at p. 449; accord, *Schackman,* at p. 862.)

Westfield argues the contract, viewed as a whole, demonstrates the parties contemplated and intended that a slip and fall was a risk that would be covered by the indemnity agreement because the contract stated Millard would (1) "assiduously endeavor to prevent personal injury . . . resulting from slippery . . . conditions"; (2) "continually and diligently patrol and observe [the mall] to detect and remove" slippery substances and place warning signs upon discovery of the condition; and (3) have the "primary obligation to guard against any hazard to person or property." These provisions, Westfield argues, demonstrate the risks from a slip and fall was a risk the parties contemplated would be covered by the indemnity agreement.[4]

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4 Westfield also appears to argue that the fact the contract contained a clause requiring Millard to maintain insurance and name Westfield as an additional insured confirms the understanding and intent of the parties that Millard would indemnify

Although the foregoing clauses undoubtedly show the parties contemplated that injuries from slip and falls were within the *scope* of the indemnity obligation, these clauses shed no light on whether the *extent* of that obligation included indemnification for acts by Westfield amounting to active or affirmative negligence. In *Goldman*, the contract contained nearly identical language, by providing that the subcontractor (the putative indemnitor) was required to indemnify the general contractor (the putative indemnitee) for "all claims, loss, damage, injury and liability of every kind, nature and description, directly or indirectly arising from the performance of the contract or work, *regardless of responsibility for negligence;* and from any and all claims, loss, damage, injury and liability, *howsoever the same may be caused*, resulting directly or indirectly from the nature of the work covered by the contract, *regardless of responsibility for negligence*." (*Goldman, supra*, 62 Cal.2d at 42, fn. 2, italics added.) The general contractor argued (as does Westfield here) that under *Harvey, supra*, 54 Cal.2d 445, the intent of the clause adequately showed the injury was within the intended risks for which indemnification would apply. The subcontractor asserted, as Millard argues here, that under *Vinnell* the language was insufficiently clear and express to require indemnification for affirmative acts of negligence by the general contractor. The *Goldman* court

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Westfield for affirmative acts of negligence. However, the same contractual requirement regarding insurance was present in *Rossmoor* (see *Rossmoor, supra,* 13 Cal.3d at p. 626 & fn. 1), but the *Rossmoor* court nevertheless concluded the indemnity clause was a "general" indemnity clause that provided indemnity for a loss resulting in part from an indemnitee's *passive* negligence but would not be interpreted to provide indemnity if the indemnitee had been *actively* negligent. (*Id*. at pp. 628-629.)

concluded *Vinnell* was controlling and *Harvey* was distinguishable, reasoning there were four distinguishing characteristics between the *Harvey* and *Vinnell* cases, explaining that:

> "in *Harvey* (1) 'the indemnitee did not continue to maintain independent operations on the premises' [citation]; (2) 'The injuries did not result from some conduct or omission unrelated to the indemnitors' performance' [citation]; (3) the indemnitee's breach of duty did not take the form of 'active, affirmative misconduct, but at most passive negligence—a failure to act in fulfillment of a duty of care . . . as the owner or occupier of land' [citation]; (4) the misconduct did 'not relate to some matter over which the indemnitee exercised exclusive control.' [Citation.] All four of these factors, as in *Vinnell*, operate in the instant case in favor of the indemnitor [and] *Vinnell* must therefore apply here." (*Goldman, supra,* 62 Cal.2d at pp. 45-46.)

All of these considerations militate against Westfield's claim that *Harvey* should apply under the circumstances of this case. The circumstances of the present case, viewed most favorably to the judgment, are that (1) unlike *Harvey*, Westfield *did* continue to maintain independent operations on the premises; (2) unlike *Harvey*, the injuries *did* result from some conduct or omission unrelated to or apart from Millard's performance (i.e. Westfield's manager's failure to notify Millard of the slippery condition); (3) unlike *Harvey*, Westfield's breach of duty *did* take the form of "active, affirmative misconduct" rather than mere passive negligence as the owner or occupier of land because Westfield's manager (after failing to notify Millard of the slippery condition) directed PSC to remove the barricades around the area notwithstanding the slippery condition; and (4) unlike *Harvey*, the misconduct *did* relate to some matter over which Westfield exercised exclusive control (i.e. Westfield's manager's direction to security personnel to remove the barricades around the slippery area). We conclude, as

did the *Goldman* court, that "these factors, as in *Vinnell*, operate in the instant case in favor of the indemnitor [and] *Vinnell* must therefore apply here." (*Goldman, supra*, 62 Cal.2d at p. 46.)

Westfield's reliance on *Schackman* is similarly inapposite. In *Schackman*, the property owner leased his premises (a shooting gallery) to Universal to allow Universal to film a movie scene involving a character who would use one of the gallery's guns to shoot at targets in the gallery. The indemnity clause required Universal to hold Schackman harmless from any " 'injury to or death of any person occurring on [the] property during [Universal's] use of the property.' " (*Schackman v. Universal Pictures Co., supra*, 255 Cal.App.2d at p. 858.) An employee of Universal was accidentally shot, and the property owner's sole contribution to the injury was that he had told Universal (apparently before relinquishing control over the premises to Universal) that the guns were unloaded. (*Id.* at pp. 858-859.) The trial court found the injury was within the contemplation of the parties as "one of the most obvious risks" the indemnity clause was designed to protect Schackman against, and made no determination whether Schackman's contributory negligence was passive or active. (*Id*. at p. 860.) The *Schackman* court, relying heavily on *Harvey*, stated three reasons for concluding the parties intended to provide indemnity for this type of injury: a shooting injury was one of the most obvious risks the indemnitee bargained for protection against; any ambiguity would be construed against Universal because the contract was a form contract prepared by Universal; and Schackman's compensation for the lease was so de minimus that it was reasonable to

conclude the parties intended to fully protect Schackman against additional and potentially extensive liability for injuries. (*Id*. at pp. 862-863.)

The reasoning employed by *Schackman* has no application here. First, unlike *Schackman*, the putative indemnitee here (Westfield) did not relinquish control over the property's operations to the putative indemnitor, but instead remained actively involved in managing and directing activities on the property. Second, unlike *Schackman*, the trial court here apparently concluded the putative indemnitee (Westfield) *was* actively negligent in connection with the injury. Finally, unlike *Schackman*, where the contract was construed against the drafter to bar it from claiming there was an unstated exemption from the drafter's indemnification obligations, there is no suggestion that Millard was the drafter of the contract against whom any ambiguities in the indemnification clause would be construed. We conclude *Schackman* does not support Westfield's argument that the general indemnity clause in the present contract demonstrates the parties intended that Millard would be liable for injuries attributable to Westfield's actively negligent conduct.

C. Conclusion

We conclude the trial court correctly ruled the indemnity language in the contract must be construed as a general indemnity clause under which Westfield may not claim indemnity for acts by it amounting to active or affirmative negligence, and Millard was therefore not required to indemnify Westfield to the extent its liability to the patron was premised on its affirmative negligence. Because we must presume the evidence supported the implied determination by the trial court that Westfield was actively

negligent in connection with the injury, we affirm the judgment denying Westfield's claim for indemnity.

DISPOSITION

The judgment is affirmed. Millard is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.